IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS. M.D., Petitioners, v. TERRY E. BRANSTAD ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 PETITIONERS' TRIAL BRIEF

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INTRODUCTION

Pursuant to the Court's Consent Order dated May 25, 2017, Petitioners Planned Parenthood of the Heartland, Inc. ("PPH") and Dr. Jill Meadows, by and through their undersigned attorneys submit the following Trial Brief. This brief outlines the expected evidence to be presented at trial and summarizes the law that applies to Petitioners' claims that Section 1 of Senate File 471, codified at Iowa Code § 146A (2017) ("the Act") violates rights guaranteed by the Iowa Constitution. Petitioners are entitled to judgment on their claims that the Act, if permitted to take effect, would (1) violate women's due process rights and cannot survive either the strict scrutiny test, or alternatively, the undue burden standard, and would (2) violate women's equal protection rights and cannot survive either the strict scrutiny or intermediate scrutiny standards.[1]

For over forty years, Iowa women who faced an unwanted pregnancy or a medical crisis involving their pregnancy have been able to determine for themselves how much time they need to think through their options. And those who are certain in their decision to terminate that pregnancy have been able to do so in one trip as soon as they can schedule an appointment at a health center and go through the medical screening and informed consent process. The Act would eliminate this option, and instead force all women, regardless of how certain they are, to make an additional and medically unnecessary trip to a health center at least 72 hours before they

[1] As explained in Petitioners' Resistance to Respondents' Motion to Dismiss at 21–22, Petitioners' vagueness claims have been partially resolved by intervening events since Petitioners filed their Complaint. A reasonable construction of the Act by this Court—specifically that the terms "indicators" and "contra-indicators" mean the same as the medical terms "indications" and "contraindications"—would resolve Petitioners' vagueness claims entirely.

can obtain an abortion, at which they must have an ultrasound and be given certain state-mandated information intended to promote alternatives to abortion. Iowa Code § 146A.1(1).[2]

These needless and extremely onerous requirements are among the strictest in the nation. Every woman seeking an abortion will have to make two trips and wait through the state-mandated delay—regardless of the distance she must travel to reach her provider, her ability to make an additional trip, her own medical needs, her judgment, her doctor's judgment, whether she is the victim of sexual assault or intimate partner violence, or any other individual life circumstance. The evidence at trial will show that, by subjecting all women seeking abortion to both a 72-hour mandatory delay and an additional trip requirement—a burden placed on patients seeking no other medical procedure in Iowa—the Act can only serve to deter women from obtaining an abortion, and to stigmatize, punish, and discriminate against those who do. Far from serving any medical purposes, it will only expose women to increased medical risk, because abortion is safest earliest in pregnancy. The Act thus violates Petitioners' and their patients' rights as guaranteed by the Iowa Constitution.

FACTUAL SUMMARY

A. The Act

The Act passed the Iowa Legislature on April 18, 2017, with an immediate effective date upon the Governor's signature. The 72-hour mandatory delay provision was added in at the last minute with virtually no debate.[3] Upon learning Governor Branstad intended to sign the Act into

[2] The Act contains an extremely narrow medical exception to the 72-hour delay requirement, as explained below.

[3] Chelsea Keenan, Iowa Abortion Bill Comes with Add-Ons, The Gazette (Apr. 16, 2017) http://www.thegazette.com/subject/news/iowa-abortion-bill-comes-with-add-ons-20170416. Furthermore, to add the 72-hour requirement to an unrelated bill, the House voted to suspend the

law on May 5, 2017, Petitioners immediately moved for temporary injunctive relief in this Court on May 3, 2017. This Court denied relief on May 4, and Petitioners immediately moved for relief from the Iowa Supreme Court. On May 5, 2017, Governor Branstad signed the Act and it was in effect. However, on that same day, the Iowa Supreme Court temporarily stayed the Act from continuing to take effect until that Court had an opportunity to receive and consider further briefing. See Order, Iowa Sup. Ct. No. 17-0708, May 5, 2017. On May 9, the Iowa Supreme Court extended the stay pending a final hearing and decision in this Court, and ordered the parties to hold a final hearing on the merits on an expedited basis. See Order, Iowa Sup. Ct. No. 17-7078, May 9, 2017.

The Act makes it drastically harder for women to access an abortion in Iowa, requiring them to make two or more trips to the health center and be subjected to an extreme mandatory delay. Specifically, the Act requires "[a] physician performing an abortion" to "obtain written certification from the pregnant woman . . . at least seventy-two hours prior to performing the abortion" that she has undergone an ultrasound. Iowa Code § 146A.1(1). The woman also must be given the option to view the ultrasound and/or listen to a description of the fetus based on the ultrasound image and the fetus's heartbeat. Id. § 146A.1(1)(a)–(c).

In addition, the Act mandates that a woman certify at least 72 hours in advance that she has been provided certain information, "based upon the materials developed by the department of public health," including: information about "options relative to a pregnancy," as well as "[t]he indicators, contra-indicators, and risk factors, including any physical, psychological, or

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rules on germaneness. See James Q. Lynch, Iowa House Debates 20-week Abortion Ban, The Gazette (April 4, 2017) http://www.thegazette.com/subject/news/government/iowa-house-debates-20-week-abortion-ban-20170404.

situational factors related to the abortion in light of the woman's medical history and medical condition." Id. § 146A.1(1)(d)(1)(a), (b). The Act requires these materials to contain various information, including "[m]aterials that encourage consideration of placement for adoption." Id. § 146A.1(1)(d)(2)(b).

The Act does not include a general health exception, nor does it include any exceptions for women with nonviable fetuses, women who are the victims of sexual assault or intimate partner violence, or women who have to travel hundreds of miles to reach the nearest clinic where they can receive care. It provides only extremely narrow medical exceptions for: "[a]n abortion performed to save the life of a pregnant woman"; "[a]n abortion performed in a medical emergency"[4]; and "[t]he performance of a medical procedure by a physician that in the physician's reasonable medical judgment is designed to or intended to prevent the death or to preserve the life of the pregnant woman." Id. § 146A.1(2)(a)–(c).

Physicians who violate the Act are subject to licensee discipline. Id. § 146A.1(3); Iowa Code § 148.6(2)(c) (2017) ("Pursuant to this section, the board may discipline a licensee who is guilty of any of the following acts or offenses: . . . Violating a statute or law of this state . . . which statute or law relates to the practice of medicine."). And as Respondents admit, "Respondent Iowa Board of Medicine is the agency responsible for examination, licensing, and discipline of physicians practicing in Iowa." Resp'ts' Mot. to Dismiss 2 (citing Iowa Code §§ 147, 148).

[4] A medical emergency is narrowly defined as "a situation in which an abortion is performed to preserve the life of the pregnancy woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman." Iowa Code § 146B.1(6).

B. Provision of Abortion Services in Iowa

Petitioner Dr. Jill Meadows, a board-certified obstetrician-gynecologist and the medical director of PPH, will testify to the health care services that PPH provides in Iowa. PPH provides a wide range of healthcare at its Iowa health centers, including well-women exams, cancer screenings, testing and treatment for sexually transmitted infections ("STIs"), a range of birth control options including long-acting reversible contraception ("LARC"), transgender healthcare, and medication and surgical abortion. As Dr. Meadows will testify, over the past year (April 1, 2016 to March 31, 2017), PPH provided over 2000 medication abortions and over 1000 surgical abortions in Iowa. PPH provides both surgical and medication abortion at two clinics in Iowa, in Des Moines and Iowa City. Currently another four of PPH's health centers provide only medication abortion, which is an early method of ending a pregnancy using pills rather than surgery.[5] In Ames, a physician provides this care in person. Since 2008, PPH has also used telemedicine to provide medication abortion at a number of health centers; PPH currently provides this care in Bettendorf (Quad Cities), Cedar Falls, and Council Bluffs.[6] The Bettendorf health center will close in the near future.

Dr. Daniel Grossman, an obstetrician-gynecologist with over 20 years of clinical experience and a leading medical researcher in the field of reproductive health care, will explain that women decide to terminate a pregnancy for a variety of reasons, including familial, medical,

[5] Previously, PPH had been able to offer medication abortion at additional health centers in the state. As Dr. Meadows will explain, because of a recent law banning PPH from participating in Iowa's Medicaid waiver family planning program, PPH had to close several of its health centers in the state in late June 2017, including health centers that also provided medication abortion.

[6] The Iowa Supreme Court recently described PPH's use of telemedicine in detail in Planned Parenthood of Heartland, Inc. v. Iowa Bd. of Med., 865 N.W.2d 252, 255 (Iowa 2015), and recognized that it had been shown to expand access while still protecting patient safety.

financial, and personal reasons. Approximately one in three women in this country will have an abortion by age forty-five. Dr. Grossman will further testify that the majority of women who seek abortions are mothers who have decided that they cannot parent another child at this time, and that most women seeking abortions plan to have children (or additional children) when they are older, financially able to provide necessities for them, and/or in a supportive relationship with a partner so that their children will have two parents. Dr. Meadows will testify that a significant percentage of PPH's abortion patients already have at least one child.

The testimony at trial will demonstrate that prior to the Act, PPH always obtained the informed consent of its patients for all of their care. Dr. Meadows, who has provided reproductive health care services for over twenty years, including medication and surgical abortions to tens of thousands of patients, will testify that patients are provided with all information necessary for them to fully understand the risks and benefits of abortion and of the alternatives to abortion, and make a fully informed and voluntary decision to have an abortion. Jason Burkhiser Reynolds, the manager of PPH's Rosenfield health center who has spoken to, and provided patient education to, hundreds of PPH's abortion patients, will also testify regarding PPH's comprehensive patient education process—available on the day of the procedure—which inter alia gives patients multiple opportunities to ask questions and discuss any concerns they may have. Moreover, trained staff members who take patients through this process ask open-ended questions, discuss with patients their decision-making process and state of mind, and identify red flags that suggest a patient may not be certain that she wants to have an abortion.

Consistent with Iowa law, see Iowa Code § 146A.1 (July 2015), and in accordance with PPH's medical guidelines, PPH also provides an ultrasound to every woman seeking an abortion and gives her the opportunity to view the ultrasound, if she chooses. As Dr. Meadows will testify, most patients do not choose to view the ultrasound.

Dr. Meadows and Dr. Grossman will provide expert testimony that PPH's practices are consistent with the standard of care, good medical practice, and medical ethics. PPH's informed consent practices are also consistent with Iowa law and the way informed consent is provided for other procedures. See, e.g., Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC, 819 N.W.2d 408, 416 (Iowa 2012); Morgan v. Olds, 417 N.W.2d 232, 235 (Iowa Ct. App. 1987) (citing Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355, 358 (Iowa 1987)).[7] Informed consent includes disclosing "information material to a patient's decision to consent to medical treatment," Estate of Anderson ex rel. Herren, 819 N.W.2d at 416, and "all material risks involved in the procedure," Doe v. Johnston, 476 N.W.2d 28, 31 (Iowa 1991). Prior to the Act, Iowa did not require a mandatory delay and additional clinic trip for *any* medical procedure, including abortion.

Dr. Meadows, Mr. Reynolds, and Dr. Grossman will provide expert testimony that the overwhelming majority of patients are aware of their options and are certain in their decision to terminate their pregnancy by the time they arrive at their appointment. As Dr. Grossman will explain, this is consistent with peer-reviewed research conducted on patient certainty before abortion. In fact, studies show that patients were as or more certain of their decision to have an abortion than patients presenting for other procedures or treatments. If patients are not certain

[7] Iowa law also requires informed consent for procedures performed via telemedicine, such as medication abortions. Iowa Admin. Code 653-13.11(147, 148, 272C).

they wish to terminate their pregnancy, Dr. Meadows and Mr. Reynolds will testify that PPH will work with the patients to articulate and consider the values, goals, and circumstances relevant to that decision. If those do not point the patients to a clear decision, PPH will not proceed with the abortion and instead advise them to take more time to consider their options. Mr. Reynolds will testify that he has never had a patient tell him after her abortion procedure that she wished she had more time with the decision or continued her pregnancy. Instead, patients know they made the right decision and are relieved they were able to terminate their unwanted pregnancies.

C. Effect of the Act on Women Seeking Abortions in Iowa

Petitioners' witnesses will provide testimony that the Act's unnecessary and extremely onerous requirements will impose substantial burdens on women seeking abortions in Iowa. Even prior to the Act, women already faced many obstacles in accessing abortion in Iowa due, in part, to the fact that so few physicians offer this care and that Iowa law includes a medically unnecessary prohibition on other licensed clinicians' doing so. Petitioners' witnesses will explain that patients already struggle to find the resources, time and transportation to come for an appointment, particularly if they are trying to keep their decision to have an abortion confidential. Indeed, Mr. Reynolds will testify that some patients already travel for hours to reach PPH's Rosenfield health center. The 72-hour mandatory delay and additional trip requirement will significantly compound these obstacles. Dr. Grossman will testify that when legal abortion is unavailable or difficult to access, some women turn to illegal, and unsafe, methods to terminate unwanted pregnancies. Other women, deprived of access to legal abortion, are forced to carry an unwanted pregnancy to term.

i. Travel Delays and Other Harms

While the Act specifies a 72-hour minimum delay, in practice it will cause far longer delays for women. Dr. Grossman will testify that currently 27.8% of women of reproductive age in Iowa, or about 162,000 women, live in a county at least 50 miles from the nearest abortion provider in the state. About 260,000 women of reproductive age, or 44% of this population in Iowa, live in a county that is 50 miles or farther from the nearest facility providing surgical abortion in the state—which, depending on gestational age and other factors, may be a woman's only option for obtaining an abortion. With two required visits, almost half of the state's population will have to travel at least 200 miles roundtrip to obtain a surgical abortion.

The extra travel required by the Act will mean that women will have to take far more time off school, work, and/or home, which would be extremely difficult for many of them to do. Women will also have to pay for additional travel costs, including potentially hotel costs for several nights if they are unable to make two separate trips to the health center at least 72 hours apart. And low-income women will find it particularly difficult to comply with the Act's requirements, as described further below, due to, inter alia, inflexible job schedules and difficulty in finding transportation and childcare. Making these arrangements will force women to delay their abortion long past the mandated 72 hours. Dr. Grossman will testify about research showing that long travel distances push women into obtaining abortions further into their pregnancy, when abortion is less safe and more expensive, and can prevent women from having an abortion altogether.

Moreover, as Dr. Meadows will testify, because PPH's health centers are already stretched thin, patients will be delayed well beyond 72 hours (even without taking into account

patients' own scheduling constraints and need to make additional logistical and financial arrangements). Due to limited clinician availability and the fact that PPH is restricted by other laws from expanding access to care, PPH is only able to schedule abortion patients 1–3 days a week at some of its health centers, and even less frequently at the others. As a result, staff already have to schedule patients anywhere from one to three weeks out or even longer. If PPH has to schedule an extra appointment for each patient, these delays will be even greater.[8]

The evidence at trial will also demonstrate that the delays caused by the Act will harm women's health. Dr. Meadows and Dr. Grossman will provide expert testimony that while abortion is an extremely safe procedure, the later an abortion takes place in pregnancy, the greater the medical risks for the woman, as well as the greater the cost. As Dr. Meadows will testify, those increased costs will come on top of additional clinic-related costs from extra appointments.

ii. Loss of Access to Services

Additionally, Drs. Meadows and Grossman will opine that the Act will prevent a significant number of women from obtaining a medication abortion because it will push them past the gestational age at which this method is available (i.e., ten weeks from the first day of the woman's last menstrual period ("LMP")).[9] This harms women because, as Petitioners' witnesses will explain, many women strongly prefer medication abortion to surgical abortion; for example, for sexual assault survivors, medication abortion may feel less invasive and, for that reason, may

[8] Indeed, as Dr. Meadows will testify, this is exactly what occurred when Arkansas, where PPH previously provided abortions, enacted a two-trip, 48-hour waiting period (prior to that, it had required a shorter waiting period and allowed the first interaction to be over the phone).

[9] Last year approximately 30% of PPH's medication abortion patients—over 600 patients—received a medication abortion in their ninth or tenth week of pregnancy. Iowa's vital statistics demonstrate that over half of the abortions performed in 2015 were medication abortions.

be far easier to undergo. For others, this method is medically indicated. And even for those women who can still access medication abortion, forced delay is harmful because medication abortion is more effective the earlier it is initiated.

By imposing delays that will make it impossible for many women to have a medication abortion, the Act will often force them to travel significantly farther to get a surgical abortion. As stated above, PPH only provides surgical abortion at two of its health centers, in Des Moines and Iowa City; medication abortion is currently available at six health centers, which are spread across the state in Des Moines, Iowa City, Ames, Bettendorf (Quad Cities), Cedar Falls, and Council Bluffs. Thus, for example, a patient in Council Bluffs who loses her chance to have a local medication abortion via telemedicine will have to travel approximately 270 additional miles round-trip to Des Moines. And as Plaintiffs' witnesses will testify, for other women seeking a surgical abortion later in pregnancy, the mandatory delay will push them past the gestational age at which surgical abortions are available in the state.

The evidence at trial will show that imposing an additional-trip requirement on patients seeking an abortion will cause them severe stress. For example, Mr. Reynolds will testify that when the Act took effect for a few hours on Friday, May 5 and patients had to be told that they would have to return at least 72 hours later to have their procedure, patients were extremely upset and worried, and some were unsure whether they would be able to make the additional trip.

iii. Harms to Abused Women and Sexual Assault Survivors

Petitioners' witnesses will testify that the mandatory delay and additional trip requirements will pose particular harms to especially vulnerable groups of Iowa women. As agreed to by the parties, the Court will receive written testimony from Dr. Lenore Walker, a

clinical and forensic psychologist with decades of expertise in violence against women, including sexual violence, intimate partner violence, and family violence, that the Act's requirements pose a very real threat to women's confidentiality and privacy. Because abusers often use forced pregnancy as a way of keeping their partners under control and closely monitor their partners, abused women will find it extremely difficult, and perhaps impossible, to arrange and attend an additional, medically-unnecessary abortion-related health visit.

Dr. Walker testifies to studies showing the lifetime cumulative rate of abuse for women seeking abortions to be at 27–31%. She also testifies that according to the CDC, 31.3% of Iowa women have experienced rape, physical violence, and/or stalking by an intimate partner. This amounts to over 360,000 Iowa women. And one study found that for women seeking an abortion in Iowa, 13.8% had been subjected to physical or sexual abuse in the past year alone.[10]

And as Dr. Walker explains, forcing women whose pregnancies are the result of rape or other violent crimes to comply with the Act's requirements may cause them further psychological harm, raise privacy and confidentiality concerns, and even prevent them from accessing care altogether. Dr. Walker explains that the Act will also endanger adolescents at risk of partner or family abuse by compromising their privacy and by making it harder or impossible

[10] Indeed, Mr. Reynolds will testify that even within the few hours that the Act took effect on Friday, May 5, at least two patients who were pregnant from rape were at risk of having their abortion delayed by the Act's onerous requirements. See also Brief of Am. Cur. on Behalf of Iowa Coalition Against Domestic Violence, et al. in Supp. of Petitioners-Appellants, Planned Parenthood of the Heartland, Supreme Court No. 14-1415 at 24 (Iowa filed Nov. 10, 2014), available at https://nwlc.org/wp-content/uploads/2015/08/telemedicine_brief_formatted_11_12_3.pdf ("Am. Cur. Br. of Iowa Coalition Against Domestic Violence").

for them to terminate an unwanted pregnancy.[11] The Act makes no exceptions for these circumstances.

iv. Harms to Low-Income Women

Dr. Jane Collins, an expert in poverty, gender, and low-wage labor markets, will testify that low-income women will find it particularly difficult to comply with the Act's additional trip and mandatory delay requirement. Dr. Meadows will explain that the majority of PPH's abortion patients are living close to or below the federal poverty line. The Act will require them to rearrange inflexible work schedules at low-wage jobs, risking employer sanctions and/or job loss; arrange and pay for childcare; pay for additional travel costs; forego lost wages for missed work; and pay any additional costs associated with a later procedure. Dr. Collins will further explain that low-income women are less likely to live in households with a car or to have access to a car, especially one suited for a long trip. Public transportation between counties in Iowa is infrequent and may require overnight stays, and thus will be a significant obstacle for low-income women given the need to take time off work and find childcare.

Dr. Collins will testify that while the additional costs required for women to make an extra trip to a health center may not seem significant to someone with a higher income, they are an extremely significant expense for poor and low-income women and will impose a substantial burden on these women. These additional costs can result in poor and low-income women skimping on food and other basic necessities for themselves and their families, falling behind on bills and rent, and taking on debt they cannot afford. The process of finding and saving money to

[11] Petitioners' witnesses will testify that the Act's requirements are also likely to be particularly burdensome, if not prohibitive, for minors seeking an abortion without parental involvement, who are already required by Iowa law to navigate a judicial bypass before obtaining care. Iowa Admin. Code 641-89.21(135L).

pay for additional costs resulting from the Act will likely further delay some women and will make it impossible for others to terminate their pregnancy.

v. Harms to Women Seeking Medically-Indicated Abortions

Petitioners' witnesses will testify that women with wanted pregnancies who seek abortions to protect their medical well-being will also face grave harms, unless they are at serious risk of losing their lives or impairment of "a major bodily function" (a determination their physician must make knowing she could lose her license if the Board of Medicine disagrees). See Iowa Code §§ 146A.1(2), 146B.1(6) (2017). These witnesses will opine that the Act will thus impose serious medical risks to women facing one of the numerous complications of pregnancy that threaten a woman's health outside the dangerously narrow confines of the Act's exceptions.

They will also testify that for women who decide to terminate a wanted pregnancy after receiving a diagnosis of a severe fetal anomaly, the mandatory delay and additional-trip requirements are especially cruel, will prolong what is generally an extremely emotionally painful experience for patients, and will interfere with physicians' ability to exercise medical judgment and provide compassionate care to these patients. Furthermore, women who receive a fetal anomaly diagnosis may be close to the point in pregnancy when they can no longer have an abortion in Iowa. These women may lose the option of terminating a severely compromised pregnancy and may be forced to carry their pregnancy to term because of the mandatory delay requirement.

vi. Inability to Fulfill the Act's Requirements Elsewhere

Petitioners' witnesses will testify that although the Act does not require that a woman obtain her advance ultrasound and screening at PPH's health centers, it will be very difficult if not impossible for women outside of most metropolitan areas to obtain these services at a local health care provider for numerous reasons. First, Dr. Meadows will testify that patients attempting to obtain this care at local providers will have to research providers willing to accept them, and then schedule, coordinate, and pay for multiple appointments, instead of one. Specifically, Dr. Meadows will explain that a patient would be required to get a blood screening in addition to an ultrasound, and then wait for the results of these tests to be transmitted to a provider who could then inform her about risks and contraindications to the procedure "in light of [her] medical history," such that the patient could certify that she received these services and transmit that certification to PPH at least 72 hours in advance of their procedure, as required by the Act. Petitioners' witnesses will testify that, in additional to causing harmful and substantial delays as a matter of course, this will be extremely burdensome for women, particularly low-income women.

From an operational standpoint, Dr. Meadows will express concerns about relying on ultrasounds performed by other providers who may be less experienced than those at PPH. Dr. Meadows has had patients obtain inaccurate ultrasounds elsewhere, including from providers who have failed to detect an ectopic pregnancy, which can lead to life-threatening complications. In addition, there would be more delays in getting the ultrasound records and bloodwork results transmitted from a local provider to PPH.

Dr. Meadows will opine that abortion patients seeking a pre-abortion ultrasound in the manner required by the Act from other (non-abortion) providers are likely to face resistance and hostility. Petitioners' witnesses will also opine that patients would be very reluctant to randomly call around to find a provider that may be willing to do a pre-abortion ultrasound, or even go to a local provider they know (such as the provider that regularly provides them gynecological care, if they have one) to request a pre-abortion ultrasound because it would compromise their privacy and confidentiality. For all these reasons, it is not realistic to expect that women outside of most metropolitan areas will to be able to fulfill the pre-abortion requirements of the Act through non-abortion providers close to home.

Finally, Dr. Meadows will explain that, by singling abortion out from all other medical care and imposing a mandatory delay on women seeking this care (indeed, one that is among the most extreme in the country), the Act perpetuates the gender stereotype that women do not understand the nature of the abortion procedure, have not thought carefully about their decision to have an abortion, and are less capable of making an informed decision about their health care than men.[12] The Act thus stigmatizes women seeking abortions and sends the harmful message that they are incompetent decision-makers.

LAW APPLICABLE TO PETITIONERS' CLAIMS

A. The Act Violates Women's Due Process Rights under the Iowa Constitution

i. Under the Iowa Constitution, abortion is a fundamental right and therefore the Act is subject to strict scrutiny review.

[12] The Act (and the stereotype it embodies) is flatly contradicted by evidence about patients' abortion-related decision-making, as the evidence at trial will show.

The Iowa Supreme Court has recognized that abortion is a right protected under the Iowa Constitution. Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med., 865 N.W.2d 252, 263, 269 (Iowa 2015) (striking down under the Iowa Constitution an agency rule restricting the use of telemedicine to provide abortion); see also Resp'ts' Mot. to Dismiss 9 (acknowledging "a pregnant women has a right to access an abortion"). In Planned Parenthood of the Heartland, the Iowa Supreme Court noted that many state courts have afforded this right greater protection under their state constitutions than the "undue burden" standard of protection provided under the U.S. Constitution. Id. at 262 n.2 (citing state supreme court decisions from Alaska, Florida, Minnesota, Montana, and Tennessee). The Court did not reach the question of whether the *Iowa* Constitution affords such heightened protection because the restriction PPH challenged failed the federal standard. Id. at 263.

More recently, however, the Iowa Supreme Court held that the Iowa Constitution guarantees a fundamental right to procreate, because "the due process clause of our constitution exists to prevent unwarranted governmental interferences with personal decisions in life," and that any infringement on this right is subject to strict scrutiny review. McQuistion v. City of Clinton, 872 N.W.2d 817, 832 (Iowa 2015) (citing both state and federal constitutional precedent for this principle); see also Hensler v. City of Davenport, 790 N.W.2d 569, 581 (Iowa 2010) (noting that U.S. Supreme Court has recognized "that personal choice in matters of family life is a fundamental liberty interest," and holding that the right to raise one's child also is a fundamental right under the Iowa Constitution).

Certainly, the decision not to bear a child, no less than the decision to bear a child, merits protection as a deeply "personal choice in matters of family life." Id.[13] Reproductive choice is central to dignity, bodily integrity, and equality, and "implicit in the concept of ordered liberty." King v. State, 818 N.W.2d 1, 26 (Iowa 2012) (internal quotation marks omitted); cf. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875 (right to abortion is the "right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) (holding a woman has a "fundamental right . . . to control her body and destiny. That right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child.").

Strict scrutiny also comports with the Iowa Supreme Court's strong protection of patient autonomy as reflected in its law on informed consent for medical care. Most recently, the Court affirmed the principle of patient autonomy generally, and specifically in the context of abortion, by allowing parents to bring a "wrongful birth" claim "based on the physicians' failure to inform them of prenatal test results showing a congenital defect that would have led them to terminate the pregnancy." Plowman v. Ft. Madison Cmty. Hosp., 896 N.W.2d 393, 395 (Iowa 2017). As the Court recognized, patients have the "right to exercise control in making personal medical decisions." Id. at 405.

[13] Indeed, in their Resistance to Petitioners' Motion for Temporary Injunctive Relief and Supporting Brief at 6–7, Respondents did not question whether these two decisions are entitled to equivalent protection, but merely questioned the extent to which the Act impinges on that decision.

This Court, therefore, should hold that, under the Iowa Constitution, the right to choose abortion is a fundamental right, and therefore, subject to strict scrutiny review.[14] Hensler, 790 N.W.2d at 580; see also State v. Groves, 742 N.W.2d 90, 93 (Iowa 2007); In re J.L., 779 N.W.2d 481, 490–91 (Iowa Ct. App. 2009); State v. Jorgenson, 785 N.W.2d 708, 715 (Iowa Ct. App. 2009). A statute reviewed under the strict scrutiny standard, "is not presumed constitutional. Rather, the State carries the burden of showing that the classification is narrowly tailored to serve a compelling government interest." In re Det. of Williams, 628 N.W.2d 447, 452 (Iowa 2001).

ii. The Act cannot survive strict scrutiny.

The Act plainly fails the demanding strict scrutiny standard. The Act states a purpose of "enact[ing] policies that protect all unborn life." S.F. 471, § 5 (2017). Statements by lawmakers asserted, more specifically, that the purpose of the Act is to persuade women seeking an abortion to reconsider their decision.[15] However, the assertion of potential life as *compelling* cannot be reconciled with each individual's "right to define [her] *own* concept of existence, of meaning, of the universe, and of the mystery of human life," which even the U.S. Supreme Court has

[14] The Iowa Supreme Court in Sanchez v. State, 692 N.W.2d 812, 820 (Iowa 2005), indicated that abortion is a fundamental right.

[15] One House advocate for the amendment, Rep. Skyler Wheeler, stated, "Our hope with this is that people will see what they have in their womb." See Wheeler: Another Week of Intense Debate, nwestiowa.com (Apr. 8, 2017), http://www.nwestiowa.com/opinion/wheeler-another-week-of-intense-debate/article_4236a06e-1b4c-11e7-a4ac-bf48a7276f04.html. Another, Rep. Sandy Salmon, stated "[t]his will shine the light upon what is really inside the womb of the mother," and that the law would "help a woman consider and make a good, educated decision for herself and her baby." O. Kay Henderson, Iowa House GOP Backs Three-day Waiting Period for Abortions, RadioIowa (Apr. 4, 2017) http://www.radioiowa.com/2017/04/04/iowa-house-gop-backs-three-day-waiting-period-for-abortions/.

recognized as being "[a]t the heart of liberty." Casey, 505 U.S. at 851 (emphasis added).[16] Nor can it be reconciled with her protected "interest in *independence* in making certain kinds of important [personal] decisions." Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (emphasis added); see also Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1262 (Fla. 2017) ("[S]ocial and moral concerns [including the 'unique potentiality of human life,'] have no place in the concept of informed consent.").

As the Montana Supreme Court recognized in striking down a restriction on abortion, "[i]mplicit in this right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation"—*hers* and not the state's. Armstrong v. State, 989 P.2d 364, 377 (Mont. 1999). That court further explained that "the State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term." Id.; see also Women of State of Minn. v. Gomez, 542 N.W.2d 17, 31–32 (Minn. 1995) (holding that state's interest in potential life did not become compelling until viability); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 17 (Tenn. 2000), superseded on other grounds by art. I, sect. 36 of the Tennessee Constitution (2014) (same); Comm. To Defend Reprod. Rights v. Myers, 625 P.2d 779, 796 (Cal. 1981) (concluding that "the asserted state's interest in protecting a nonviable fetus is subordinate to the woman's right of privacy"). This Court should follow

[16] The U.S. Supreme Court has never held such an interest to be compelling. See Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (holding that the government has a "legitimate" and "substantial" interest in preserving and promoting fetal life (citing Casey, 505 U.S. at 846, 876)).

these other courts in finding that, given the deeply personal nature of the abortion decision, the state cannot have a compelling interest in intruding on that decision before viability.

Moreover, the State cannot establish that the Act advances a compelling interest because the evidence at trial will show that the Act does not further the State's interest. As stated above, the testimony at trial will demonstrate that women seeking an abortion already make considered decisions when choosing to end their pregnancy, even before they arrive at the health center. And at the health center, patients receive information about their options, are offered the opportunity to view their ultrasound, and given information about the risks of the abortion procedure so that they may make a fully voluntary and informed decision. See Factual Summary, Part B, above. Nor does the Act serve any medical purpose. Cf. Gainesville Woman Care, 210 So. 3d at 1260 (finding "that the State failed to provide any compelling reason to enhance the informed consent provision or how the current informed consent provision was failing in some way").

Moreover, following the Iowa Supreme Court's precedent of protecting patient autonomy in its informed consent jurisprudence, see Law Applicable to Petitioners' Claims, Part A.i, above, this Court should reject the state's authoritarian and paternalistic attempt, through the Act, to control women seeking an abortion by imposing additional obstacles on them that have nothing to do with their medical needs and everything to do with the state's opinion that they are making an ill-advised decision. Cf. Plowman, 896 N.W.2d at 418 (Mansfield, J. dissenting) ("An honest appraisal of the [statute] would find that it is intended to *discourage*, not encourage, abortions. The statute sets forth prerequisites for abortion only, not for carrying a pregnancy to

term."). Indeed, expert testimony will show that the mandatory delay requirement is not typical of medical care in Iowa, and violates principles of medical ethics. See Factual Summary, Part B.

Even if the State could establish that the Act furthers a compelling interest, it could not show that the Act is *narrowly tailored* to the achievement of that interest. The Act indiscriminately applies to all abortion patients regardless of their circumstances or ability to make an additional trip to the health center. See also Varnum v. Brien, 763 N.W.2d 862, 899 (Iowa 2009) (striking statute where reasoning underlying governmental objective "unsupported by reliable scientific studies"). As Petitioners' witnesses will explain, the Act only serves to subject all these women to delay, increased health risks, costs, stigma, logistical burdens, and severe stress. See Gainesville Woman Care, 201 So. 3d at 1261 (noting that mandatory 24-hour delay may result in delay "considerably more" than required 24 hours and that abortion was the only medical procedure singled out for delay during informed consent process); Sundquist, 38 S.W.3d at 23–24 (citing evidence "that a large majority of women who have endured waiting periods prior to obtaining an abortion have suffered increased stress, nausea and physical discomfort," as well as evidence of "financial and psychological burdens").

The Act also applies in cases of fetal anomaly, rape, incest, and domestic violence, as well as when a patient's health is in danger outside of the Act's narrow exceptions. See Sundquist, 38 S.W.3d at 24 (finding "compelling argument" that Tennessee's two-trip, 48-hour waiting period "is especially problematic for women who suffer from poverty or abusive relationships"); Gainesville Woman Care, 210 So. 3d at 1261 (striking a 24-hour mandatory delay requirement and considering evidence that "requiring a woman to make a second trip increases the likelihood that her choice to terminate her pregnancy will not remain confidential,

which is particularly important, as amici assert, in the domestic violence and human trafficking context"); cf. Casey, 505 U.S. at 894 (stating Court must not "blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion" due to domestic violence and abuse); Planned Parenthood Ark. & E. Okla. v. Jegley, Case No. 4:15-cv-00784-KGB, 2016 WL 6211310, at *31 (E.D. Ark. Mar. 14, 2016) (considering fact that abortion restriction that would require women to make extra trip to health center to have an abortion applied "equally to victims of rape, incest, other forms of sexual abuse, and domestic violence" when preliminarily enjoining it).

Finally, it hardly can be said that the Act is narrowly tailored when it imposes requirements that are among the strictest in the nation. Indeed, of the states that impose a mandatory delay, the overwhelming majority mandate a 24-hour delay, and even of those, many do not require a second trip. See Counseling and Waiting Periods for Abortion, Guttmacher Inst. (2017) https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.[17]

For all these reasons, the Act fails strict scrutiny review and violates Petitioners' patients' due process right to reproductive freedom.

iii. Alternatively, the Act's requirements violate the "undue burden" standard.

In Planned Parenthood of the Heartland, the Iowa Supreme Court declined to reach the issue of whether the decision to end a pregnancy is protected by strict scrutiny under the Iowa

[17] No court—state or federal—has upheld a two-trip, 72-hour mandatory delay restriction. See Planned Parenthood of Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048 (D. S.D. 2011) (enjoining that state's 72-hour requirement). Moreover, the Act lacks the tailoring of Texas' and Virginia's 24-hour mandatory delay laws, which not only require far less delay, but also exempt women traveling more than 100 miles to reach a clinic from the extra trip requirement. See Tex. Health & Safety Code Ann. § 171.012(a)(4); Va. Code Ann. § 18.2-76(B).

Constitution, but held that, at a minimum, it is a right protected by the "undue burden" standard established by the U.S. Supreme Court. Under this standard, while the state has "'important and legitimate interests in preserving and in protecting the health of the pregnant woman' and 'in protecting the potentiality of human life,'" the state may not impose an undue burden on the woman's right to an abortion. Planned Parenthood of the Heartland, 865 N.W.2d at 263 (citing Roe v. Wade, 410 U.S. 113, 162 (1973)). Moreover, any "means chosen by the State to further the interest in potential life must be calculated to *inform* the woman's free choice, *not hinder* it." Casey, 505 U.S. at 877 (emphases added).

More recently, the U.S. Supreme Court in Whole Woman's Health v. Hellerstedt stressed that the undue burden standard requires a court to balance "the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. 2292, 2309 (2016); see also Planned Parenthood of the Heartland, 865 N.W.2d at 268 ("Consistent with United States Supreme Court precedent, we must now weigh the health benefits of [the challenged] rule[s] against the burdens they impose on a woman who wishes to terminate a pregnancy.").[18] In the year following Whole Woman's Health, two federal district courts have applied that standard to laws that the state claimed promoted its interest in fetal life, both finding that the laws failed this balance. See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, No. 1:16-cv-01807-TWP-DML, 2017 WL 1197308, at *6 (S.D. Ind. March 31, 2017) (applying

[18] Although Planned Parenthood of the Heartland indicated in dicta that the precise federal test might vary depending on the asserted state interest, id. at 263–64, in fact Casey applied the same balancing test to provisions that purported to advance various interests, including the state's interest in fetal life. The U.S. Supreme Court recently recognized this in Whole Woman's Health, and summarized the "undue burden" standard as requiring generally that courts "consider the burdens a law imposes on abortion access together with the benefits these laws confer." Whole Woman's Health, 136 S. Ct. at 2309 (noting that Casey performed this balancing with respect to a spousal notification provision, and a parental notification provision).

balancing test to law requiring women to obtain ultrasound 18 hours before abortion); Whole Woman's Health v. Hellerstedt (Whole Woman's Health II), No. A-16-CA-1300-SS, 2017 WL 462400, at *7 (W.D. Tex. Jan. 27, 2017) (applying balancing test to law passed for the asserted purpose of "'expressing the State's respect for life'").

The U.S. Supreme Court also stressed in Whole Woman's Health that, in assessing the benefits as well as the burdens, a court must consider the actual evidence and not merely defer to legislative findings or the government's speculation. Whole Woman's Health, 136 S. Ct. at 2309 (it "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue"); id. at 2311–12 (noting the absence of evidence demonstrating the existence of a problem the challenged statute would solve); cf. Planned Parenthood of the Heartland, 865 N.W.2d 252 (closely examining the evidence on safety and burden). As Planned Parenthood of the Heartland and other decisions explain, this inquiry is "context-specific" and turns on the evidence and record in the case. See id. at 268–69; Planned Parenthood of Ind. & Ky., Inc., 2017 WL 1197308, at *23 ("[T]he undue burden analysis is case specific.").

Here, the evidence at trial will show that the burdens imposed on patients by the Act's 72-hour delay and additional trip requirement plainly exceed any benefits. There is no evidence that women having abortions in Iowa have been unable to fully consider their options and give full and informed consent on the day their abortion procedure is performed. Indeed, as Dr. Meadows will testify, Iowa law already requires, consistent with PPH's medical guidelines, that

women receive an ultrasound and give informed consent prior to their abortion.[19] Nor is there any evidence that requiring a woman to receive the state-mandated information required by the Act 72 hours before her abortion advances any legitimate state interest; in fact, Dr. Grossman will testify to research showing that waiting period requirements do not enhance decision-making. This is particularly true given that, as Dr. Meadows and Mr. Reynolds will explain, most of PPH's patients have carefully thought through their options and are already firm in their decision by the time they reach the health center to have an abortion.

Not only will the evidence at trial show that the Act fails to afford any medical or other benefit (in terms of persuading women to continue their pregnancy, as opposed to simply hindering them from accessing an abortion), but "there is no question the [Act] imposes some burdens that would not otherwise exist and did not exist before the [Act] was adopted," Planned Parenthood of the Heartland, 865 N.W.2d at 267, and the evidence will demonstrate that these burdens are serious. In assessing burden, courts consider "the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and other abortion regulations." Planned Parenthood of Ariz. v. Humble, 753 F.3d 905, 915 (9th Cir. 2014); see also Planned Parenthood of Ind. & Ky., Inc., 2017 WL 1197308 at *20 (considering additional travel expenses, difficulty in procuring child-care, lost wages, potential loss of employment, and increased risk of disclosure of abortion to abusive partners in undue burden analysis). Courts also "consider evidence that a law delays and deters patients obtaining abortions, and that delay in abortion increases health risks," Humble, 753 F.3d at 915 (internal quotation marks omitted); see

[19] In Whole Woman's Health, the Court held the restriction at issue did not provide any benefits by comparing it to previously-existing requirements and finding that "there was no significant health-related problem that the new law helped to cure." 136 S. Ct. at 2311.

also Parenthood of Ind. & Ky., Inc., 2017 WL 1197308 at *21 (considering evidence on availability of abortion appointments and informed consent appointments at "overburdened" Planned Parenthood health centers).

Applying this standard, and as explained further in the Factual Summary section above, the Act clearly imposes severe burdens on women seeking an abortion. The Act will require all women to make at least two visits to a health center a minimum of 72 hours apart—to have an ultrasound and receive state-mandated information, and at least 72 hours later, to obtain the abortion. In reality, as Petitioners' witnesses will explain, the Act will cause delays far greater than 72 hours due to scheduling constraints that exist both on PPH and women seeking abortions, and due to women's need to make the logistical and financial arrangements for the additional, medically unnecessary trip. The evidence at trial will show that because of the additional trip, women will be traveling longer distances to access abortion, with almost half of the state's population traveling at least 200 miles roundtrip to obtain a surgical abortion. This will further delay women. The evidence will show that these delays will threaten women's health, increase the cost of the procedure, and deny many women access to medication abortion, which in turn will pose additional barriers as more women will have to travel farther to access abortion. For some women, the Act will mean they cannot access abortion at all.

Other courts have recognized that impeding women's access to abortion in these ways imposes an undue burden. See, e.g., Parenthood of Ind. & Ky., Inc., 2017 WL 1197308 at *21; Humble, 753 F.3d at 915 (recognizing that state restrictions affecting "the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number

of women" and describing harms of delaying an abortion); id. at 918 (holding a law that effectively denies some women a medication abortion imposed an "undue burden").

Indeed, the Iowa Supreme Court has already recognized that increased travel distances and an additional trip to a clinic can "cause a working mother to potentially miss two to four days of work and incur additional childcare expense," and can result in "a greater possibility that an abusive spouse, partner, or relative could find out the woman is terminating her pregnancy." Planned Parenthood of the Heartland, 865 N.W.2d at 267. The evidence at trial will show that the Act will similarly burden women. Petitioners' witnesses will also testify that the Act's requirements will greatly exacerbate patients' privacy concerns and even safety.

Furthermore, the Act's requirements cannot be equated with the 24-hour mandatory delay requirement in Casey. As the Iowa Supreme Court has held, the burden inquiry is "context-specific" and turns on the evidence and record at issue. See Planned Parenthood of the Heartland, 865 N.W.2d at 268–69. Here, the Act seeks to *triple* the mandatory delay period that was upheld in Casey—from 24 hours to 72 hours—and the evidence at trial will demonstrate that this longer period is particularly burdensome, and will severely delay or prevent women from obtaining abortions. Indeed, the Iowa Supreme Court recognized in Planned Parenthood of the Heartland that substantial travel burdens do rise to the level of an undue burden. 865 N.W.2d at 269. Petitioners' witness testimony will establish that the travel- and delay-related costs imposed by the Act will constitute an "economic shock" for low-income women—who constitute over 50% of Petitioners' patients.[20]

[20] Even with fewer demonstrated harms than those presented here, Casey found the evidence of burden "troubling," and found that it posed a "closer question" than other provisions, but that in

Second, while Casey noted *some* of the burdens also present here, Petitioners will present evidence of significant additional burdens not considered in Casey. In particular, the record considered in Casey—a case decided almost twenty-five years ago, long before safe medication abortion existed and with far less research on the effects of delayed abortion—differs substantially from the record here. Unlike in Casey, testimony at trial will establish that the Act will substantially reduce access to safe medication abortion (an effect considered significant by the Iowa Supreme Court in Planned Parenthood of the Heartland, Inc., 865 N.W.2d at 267). In addition, the evidence will show that given surgical abortion is only provided in two cities in Iowa, some women will be forced to travel hundreds of miles to obtain an abortion. Compare Rachel K. Jones, et al., Abortion in the United States: Incidence and Access to Services, 2005, 40 Persp. Sexual & Reprod. Health 6, 11 (2008) (at the time of the Casey decision, there were 81 abortion providers in Pennsylvania). Substantial research since Casey was decided also demonstrates that mandatory delay laws severely burden women seeking an abortion, and that delaying or preventing women from accessing an abortion has serious, negative effects on their well-being, as Dr. Grossman will testify.

Thus, while "the record evidence" before Casey "show[ed] that in the vast majority of cases, a 24-hour delay does not create an appreciable health risk," 505 U.S. at 885, the evidence at trial will demonstrate that the extreme mandatory delay and additional trip requirement here imposes such risks—in the form of delayed abortions and the increased risks associate with delay, the risks to patients with medical indications for medication abortion who are delayed past

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that case "on the record before us," there was insufficient evidence of an undue burden. 505 U.S. at 885–87.

the 10-week cut-off for this method, and the risks to patients delayed past the cut-off for abortion who are forced to travel out of state (if they can afford it) or carry to term.

Finally, unlike in Casey, Petitioners' witnesses will testify—including by testifying to scientific research that was developed since Casey was decided—that the Act does nothing to further the State's interest.

For all of these reasons, like the telemedicine abortion ban recently struck down by the Iowa Supreme Court in Planned Parenthood of the Heartland, the Act "places an undue burden on a woman's right to terminate her pregnancy," id., 865 N.W.2d at 269, because there is no evidence that it actually advances any valid state interest and because it unquestionably will make it "more challenging for many women who wish to exercise their constitutional right to terminate a pregnancy in Iowa to do so." Id. at 268.[21]

B. The Act violates women's equal protection rights under the Iowa Constitution.

The evidence at trial will show that the Act violates the equal protection rights of women seeking an abortion because it singles them out for burdensome restrictions not imposed on patients seeking any other form of health care, including procedures with far greater risks and those for which patients express similar or higher rates of uncertainty before proceeding. Indeed, in Planned Parenthood of the Heartland, the Iowa Supreme Court recognized that where the Board of Medicine had taken steps to facilitate the use of telemedicine in accordance with "evidence-based" standards, but sought to restrict telemedicine for abortion, "'[a]n issue of equal

[21] In addition to all the harms recognized as substantial and undue in Planned Parenthood of the Heartland, Petitioners' witnesses will testify that the Act further harms women by shaming them, indicating that they are not equipped to understand or make decisions about their own pregnancy and are wrong to seek an abortion. Cf. Humble, 753 F.3d at 915 (undue burden standard includes consideration of whether a state restriction "stigmatiz[es] . . . abortion practice").

protection of the laws [was] lurking in th[e] case.'" 865 N.W.2d at 269 (quoting Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 790 (7th Cir. 2013)).

As set forth in Law Applicable to Petitioners' Claims, Part A.i above, abortion is a fundamental right, and therefore the correct standard of review of Petitioners' equal protection claim is strict scrutiny. See, e.g., In re Det. of Williams, 628 N.W.2d at 452 (holding strict scrutiny applies under Iowa Constitution when fundamental rights are at stake; under strict scrutiny, a statute is "not presumed constitutional," rather "the State carries the burden of showing that the classification is narrowly tailored to serve a compelling government interest"); see also Varnum, 763 N.W.2d at 880; Sanchez v. State, 692 N.W.2d 812, 817 (Iowa 2005).

Alternatively, even if this Court were to conclude that abortion is not a fundamental right under the Iowa Constitution, the Act's requirements would still be subject to intermediate scrutiny because they facially discriminate against women. Varnum, 763 N.W.2d at 880 (sex-based classifications subject to intermediate scrutiny); see Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.W.2d 862, 866–67 (Iowa 1978) ("[A]ny classification which relies on pregnancy as the determinative criterion is a distinction based on sex." (citation and internal quotation marks omitted)), superseded by statute on other grounds, Iowa Code § 216.19 (2009); see also N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 854 (N.M. 1999) (treating abortion restriction as gender-based and applying heightened scrutiny because "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them" (citation omitted)); cf. Casey, 505 U.S. at 856 (access to legal abortion is necessary to enable women "to participate equally in the economic and social life of the Nation"). Not only does the Act single out women by requiring a mandatory delay and two-

trip requirement for a medical procedure that is only available to women, but, as Petitioners' witnesses will testify, the Act also perpetuates the damaging stereotype that women are not reasonable, competent decision-makers. Cf. Sundquist, 38 S.W.3d at 23 (in due process context, agreeing that mandatory delay law "insults the intelligence and decision-making capabilities of a woman" and finding law violated state constitution). As Justices Stevens and Blackmun recognized in their opinions in Casey, concurring and dissenting in part, the very concept of forcing abortion patients to wait for a specified period before having an abortion "appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women . . . . Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, so we must reject the notion that a woman is less capable of deciding matters of gravity." Casey, 505 U.S. at 918–19 (Stevens, J., concurring in part and dissenting in part); see also Casey, 505 U.S. at 928–29 (Blackmun, J., concurring in part and dissenting in part) (agreeing). This paternalistic attitude embodied by the Act also does not comport with the Iowa Supreme Court's strong protection of patient autonomy, see Law Applicable to Petitioners' Claims, Part A.i, above.

Under the intermediate scrutiny standard, "the challenged classification [must be] substantially related to the achievement of an important governmental objective." Varnum, 763 N.W.2d at 880. In applying this standard, "the reviewing court must determine whether the proffered justification is exceedingly persuasive," and the court should "scrutinize the means used to achieve that end" and, in particular, "drill down" on the connection between the classification and asserted adjective. Id. at 897–98 (internal quotation marks omitted). In

addition, the burden of justifying the Act is "demanding and it rests entirely on the *State*." Id. (internal quotation marks omitted and emphasis added).

For the same reasons stated above, Law Applicable to Petitioners' Claims, Part A.ii, the state's asserted interest in potential life cannot be recognized as a "compelling" or "important" interest, or at the very least not as one that the government may advance by intruding to such a degree on women's decision-making.[22] And, for the same reasons set forth in Law Applicable to Petitioners' Claims, Part A.ii, even if the Iowa Constitution permitted Respondents to intrude in such a personal decision, the evidence will demonstrate that the means Respondents have chosen are not "substantially tailored" to such an interest because they apply to all patients indiscriminately and do so in a way that shames women and severely burdens access to constitutionally-protected medical care. See Varnum, 763 N.W.2d at 901 ("[A] law so simultaneously over-inclusive and under-inclusive is not substantially related to the government's objective.").[23]

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[22] While federal courts have recognized the state's interest in potential life (although they have not recognized it as compelling), that does not begin to answer the question of whether, under the Iowa Constitution, it is sufficiently strong to satisfy a heightened scrutiny standard. See State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (because of "independent nature of our state constitutional provisions . . . [t]he degree to which we follow United States Supreme Court precedent . . . depends solely upon its ability to persuade us with the reasoning of the decision"). Indeed, "social and moral concerns [including 'unique potentiality of human life'] have no place in the concept of informed consent." Gainesville Woman Care, 210 So. 3d at 1262; see generally Law Applicable to Petitioners' Claims, Part A.i.

[23] The evidence will show that Petitioners will prevail even under the rational basis standard. Under Iowa equal protection jurisprudence, a court determining whether a statute passes the rational basis standard "must first determine whether the Iowa legislature had a valid reason" for the differential classification. Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 7 (Iowa 2004); see also id. at n.3 (holding the policy reason justifying the classification should be "credible"). As Petitioners' witnesses will explain, the Act's imposition of onerous requirements on no other medical procedure other than abortion in the state, serves no credible or valid

Thus, this Court should find that the Act violates Petitioners' patients' equal protection rights.

CONCLUSION

The evidence at trial will demonstrate that the Act's mandatory delay and additional trip requirements violate Petitioners' and their patients' rights under the Iowa Constitution and the Act should be permanently enjoined.

Respectfully submitted,

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purpose. The Act only serves to burden patients, including by delaying or preventing them from obtaining abortions.

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